
(2002) 03 P&H CK 0012

In the Punjab And Haryana At Chandigarh

Case No : IT Ref. No. 65 of 1986 18 March 2002 A.Y. 1978-79 & Income-tax
Reference No. 65 of 1986

Commissioner of Income Tax

APPELLANT

Vs

Export House

RESPONDENT

Date of Decision : 18-03-2002

Acts Referred:

Income Tax Act, 1961 — Section 143, 263, 35B, 80B

Citation : (2002) 175 CTR 137

Hon'ble Judges : N.K. Sud, J;Jawahar Lal Gupta, J

Bench : Full Bench

Advocate : R.P. Sawhney with M.S. Guglani, for the Revenue A. C. Jain, for the Assessee, for the Appellant;

Judgement

N.K Sud, J.

At the instance of the revenue, the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar (hereinafter referred to as the Tribunal), has referred the following questions of law, for the opinion of this court :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that the Income Tax Officer did not commit an error prejudicial to the interests of revenue by following the order of a Division Bench (smaller Bench) of the Tribunal in the presence of the decision of a Special Bench holding a different view which could give jurisdiction to the Commissioner to act u/s 263 of the Act ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the judgment of a Special Bench does not take precedence over the judgment of a Division Bench and thus whether the Commissioner was not empowered to invoke the provisions of section 263 to rectify the mistake committed by the Income Tax Officer in not following the judgment of a Special Bench in deciding the matter of allowance of deduction u/s 35B ?"

3. Whether on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that the materials which were not on records at the time of assessment and was made available afterwards cannot form part of the record of proceedings of the Income Tax Officer at the time he passed the order and thus cannot be taken into consideration by the Commissioner for the purpose of invoking the jurisdiction u/s 263(1) of the Act ?

2. The assessee is a firm which derived income from export of bamboos, Imli and timber to Pakistan during the relevant assessment year 1978-79. Return for this assessment year was filed declaring a loss of Rs. 1,01,243. In the computation of income, the assessee had claimed deduction u/s 35B of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), on various heads of expenditure as under :

Sr. No.

Nature of expenditure

Amount of expenditure Rs.

Sub-clause (s) of clause (b) of section 35B under which the expenditure was claimed by the assessee to fall

1.

Freight charges

7,12,031

35B(1)(b)(iii)

2.

Clearing charges

58,051

-do-

3.

Inspection charges

2,650

-do-

4.

Salaries

24,705

Sub-clause (i) to (iv) of sub-section (b) of 35B

5.

Bonus

10,425

-do-

6.

Rent

4,000

-do-

7.

Stationary

5,151

-do-

8.

Commission to SAIL

33,915

Not specified

9.

Postage and telegrams

1,084

-do-

10.

Commission to Promotion Council

3,000

-do-

11.

Advertisement

1,326

Clause (i) of sub-section (b) of section 35B(1).

Total :

8,45,338

The assessment u/s 143(3) of the Act was framed on by the Income Tax Officer on 28-1-1978, and the assessee's claim for weighted deduction u/s 35B was dealt with as under :

"This weighted deduction has been claimed in respect of the following expenses incurred in connection with and for promotion of export sales :

Rs.

(i)

Freight

7,12,031

(ii)

Clearing charges

56,051

(iii)

Inspection charges

2,650

7,70,732

Weighted deduction has also been claimed in respect of the following items of expenses :

Rs.

2.(a) Customers expenses

2,728

(b) Subscription to Chemicals & Allied Products Promotion Council for obtaining information regarding exports

3,000

(c) Advertisement

These expenses consist of printing of stickers labels which were pasted on the timber and other goods exported for their advertisement in Pakistan

1,326

(d) Rent for the maintenance of office

4,000

(e) Postage & Telegrams

1,084

(f) Printing & Stationary

5,151

(g) Salaries

24,705

(h) Bonus

10,425

(i) Commission to bank

17,832

(j) The commission paid to Steel Authority of India (a Govt. of India undertaking) on the sale of export of angle iron

33,915

All these expenses except customers expenses of Rs. 2,728 and commission to bank at Rs. 17,832 (which do not fit in properly for weighted deduction in any of the clauses of section 35B) are entitled to weighted reduction as these have been incurred in connection with the export business which comprises of entire sales to Pakistan of the various items mentioned above.

Weighted reduction at 1.1/3 times of the expenditure is worked out as under :

Rs.

Total expenditure under the above head

8,54,338

Add : 1/3rd thereto

2,84,779

11,39,117

Less : Expenses already claimed in P&L a/c

854,338

Weighted reduction admissible

2,84,779

3. The Commissioner on examination of the assessment record was of the view that the aforesaid assessment order was erroneous insofar as it was prejudicial to the interest of revenue on the point of allowing weighted deduction of Rs. 2,84,770. Accordingly, he issued a notice to the assessee to show cause why the assessment be not revised in respect of deduction u/s 35B, in the following terms :

"(i) In order to qualify for a weighted deduction u/s 35B the expenditure must necessarily be such as is incurred wholly and exclusively on an activity which clearly falls under any one of the sub-clauses of clause (b) of sub-section (1) of section 35B. The mere fact that an expenditure has been incurred in connection with and in the course of a business for the export of goods outside India does not in itself mean that the expenditure has been incurred wholly and exclusively on an activity mentioned in the various sub-clauses of clause (b) of sub-section (1) of section 35B and that, therefore, the expenditure qualifies for the weighted deduction u/s 35B. None of the afore-mentioned expenses in respect of which weighted deduction u/s 35B has been allowed by the Income Tax Officer can be said, having regard to the details furnished by the assessee in respect of these expenses in the course of assessment proceedings to have been incurred wholly and exclusively on any of the activities specified in clause (b) of sub-section (1) of section 35B.

(ii) The weighted deduction u/s 35B in respect of the expenses on freight charges, clearing charges and inspection charges mentioned at Serial Nos. 1, 2 and 3 of the statement overleaf has been allowed by the Income Tax Officer, accepting the claim made by the assessee in this behalf, on the premises that these expenses fall under sub-clause (iii) of clause (b) of sub-section (1) of section 35B on the ground that the aforesaid sub-section (iii) as interpreted by the Tribunal in the various cases cited by the assessee, does not prohibit the allowance of but rather specifically provides for the allowance of the weighted deduction in respect of the expenditure incurred on the carriage of the goods to their destination outside India or on the insurance of such goods while in transit, irrespective of whether the expenditure is incurred in India or outside India. The view taken by the various Benches of Tribunal in the cases cited by the assessee before the Income Tax Officer did not represent a correct interpretation of the aforesaid sub-clause (iii). The meaning and scope of the aforesaid sub-clause (iii) have been subsequently examined in depth by a special Bench of the Tribunal in the case of J. Hem Chand & Co., Bombay and the Tribunal has held vide order dated 17-6-1978, in ITA Nos. 3255 of 1976-77 and No. 3330 of 1976-77 :

"In the face of the foregoing we have no doubt in our mind that the benefit of sub-clause (iii) cannot be made available at all to (i) expenditure incurred in India in connection with the distribution, supply or provision outside India of goods, services or facilities which the assessee deals in or provides in the course of his business, (ii) expenditure (wherever incurred) on the carriage of such goods to their destination outside India and (iii) expenditure (wherever incurred) on the insurance of such goods while in transit."

The aforesaid decision of the Special Bench of the Tribunal lays down the correct position in law in respect of the aforesaid sub-clause (iii) of clause (b) of sub-section (1) of section 35B. Accordingly the aforesaid expenses incurred by the assessee by way of freight charges, clearing charges and inspection charges do not qualify for the allowance of the weighted deduction u/s 35B.

(iii) As regards the expenses in respect of salaries, bonus, rent and stationery mentioned at items 4, 5, 6 and 7 of the statement in para 1 ante, the assessee had claimed them to qualify for the allowance of the weighted deduction under sub-clauses (i) to (ix) of clause (b) of section 35B(1) on the ground that the business of the assessee was exclusively of export of goods outside India and there were no sales made locally within India. The assessee did not specify any particular activity or activities mentioned in the various sub-clauses of clause (b) of sub-section (1) of section 35B on which each of the aforesaid expenses were incurred wholly and exclusively and did not explain how this was so. The Income Tax Officer accepted the claim of the assessee for the weighted deduction in respect of these expenses without examining and determining whether these expenses had been incurred wholly and exclusively on any of the activities mentioned in the various sub-clauses of clause (b) of sub-section (1) of section 35B. On scrutinising the details of these expenses as furnished in the course of the assessment proceedings before the Income Tax Officer it is noticed that none of these expenses can be said to have been incurred wholly and exclusively on any of the activities mentioned in the various sub-clauses of clause (b) of sub-section (1) of section 35B. The mere fact that the goods of the assessee are sold entirely outside India and there are no local sales does not mean and warrant a view that these expenses have been incurred wholly and exclusively on one or the other activities mentioned in the sub-clauses of clause (1) of section 35B.

(iv) The assessee claimed the weighted deduction in respect of the expenses on commission to SAIL, postage and telegram, commission to Promotion Council, mentioned at items 8, 9 and 10 of the statement in para 1 ante only on the ground that these expenses have been incurred in connection with the export business but the assessee did not specify on which of the particular activity or activities mentioned in the various sub-clauses of clause (b) of sub-section (1) of section 35B, these expenses have been incurred wholly and exclusively and did not explain how. The Income Tax Officer accepted the claim of the assessee for the weighted deduction in respect of these expenses without examining and determining whether these expenses had been incurred wholly and exclusively on any of the activities mentioned in the various sub-clauses of clause (b) of sub-section (1) of section 35B. On scrutinising the details of these expenses as furnished in the course of the assessment proceedings before the Income Tax Officer it is noticed that none of these expenses can be said to have been incurred wholly and exclusively on any of the activities mentioned in the various sub-clauses of clause (b) of sub-section (1) of section 35B. The mere fact that the goods of the assessee are sold entirely outside India and there are no local sales does not mean and warrant a view that these expenses have been incurred wholly and exclusively on one or the other activities mentioned in the sub-clauses of clause (b) of sub-section (1) of section 35B.

(v) As regards the expenses on advertisement mentioned at item No. 11 of the statement in para 1 ante, the assessee has claimed that these expenses fall under sub-clause (i) of clause (b) of section 35B. The Income Tax Officer allowed

the weighted deduction in respect of this expenditure accepting this claim of the assessee. However, the details of the expenditure furnished by the assessee in the course of assessment proceedings before the Income Tax Officer do not show that these expenses have been incurred on advertisement or publicity outside India in respect of the export business of the assessee. Therefore, the Income Tax Officer has erroneously accepted the claim of the assessee that these expenses fall under the aforesaid sub-clause (i) and has erred in allowing the weighted deduction u/s 35B in respect on this expenditure."

4. The assessee filed a reply to the show-cause notice and after considering the same the Commissioner vide order dated 20-11-1980, reported a categorical finding for withdrawal of weighted deduction in respect of freight charges, clearing charges and inspection charges. As regards the remaining items, the Commissioner observed that the assessee's authorised representative had stated that they could not produce before him the requisite details and evidence for want of adequate time and had further stated that they would be in a position to produce all the requisite information if further time was allowed to them. Although the Commissioner did not agree with the contention that the assessee did not have adequate time to produce an the requisite details and evidence to prove its claim, he considered it fair to give a further opportunity for furnishing the requisite details and evidence to prove that the assessee had, during the relevant period, carried on the activities mentioned in sub-clauses (i), (ii), (v) and (vi) of clause (b) of section 35B of the Act and that the expenses mentioned at Serial Nos. 4 to 11 had been incurred on such activities. Accordingly he set aside the assessment already made and directed the Income Tax Officer to make a fresh assessment after giving an opportunity to the assessee to furnish the details and evidence in support of its claim u/s 35B under various heads of accounts mentioned at serial Nos. 4 to 11 of its claim. The Income Tax Officer was directed to determine the amount of weighted deduction after examining the details and the evidence so furnished by the assessee and/or making such further inquiries as may be considered by him to be necessary for this purpose. The Income Tax Officer was specifically directed not to allow weighted deduction u/s 35B in respect of expenditure on freight, clearing charges and inspection charges.

5. Against, the decision of the Commissioner the assessee came in appeal before the Tribunal. The member of the Tribunal had a difference of opinion. The Accountant Member upheld the action of the Commissioner and dismissed the appeal of the assessee. According to. him, the Income Tax Officer had committed an error prejudicial to the interest of the revenue in allowing deduction u/s 35B on freight, clearing charges and inspection charges inasmuch as he had failed to notice the decision of the Special Bench of the Tribunal in case of J. Hemchand & Co. v. ITO (1982) 1 SOT 150 (Bom) delivered in June, 1978, which was prior to passing of the assessment order in November 1978. He was of the view that taking note of a ruling or a judicial decision of the competent authority was not dependent on filing of those orders before the Income Tax Officer because he is

expected to be aware of the law on the point irrespective of the fact whether the assessee files copies of any decision or not. He further observed that ignorance of decision of the Larger Bench of the Tribunal in the case of *J. Hemchand & Co. v. ITO* (supra) had resulted in an error on the part of the Income Tax Officer which justified the action of the Commissioner u/s 263. The A.M. also opined that a decision of the large Bench of the Tribunal had greater value as a precedent and it had to be preferred to the view expressed by smaller Benches and that such a decision by precedent was binding on smaller Benches unless overruled by the High Court or Supreme Court. In respect of items at Serial Nos. 4 to 11 also, the finding of the Commissioner that deduction had been allowed by the Income Tax Officer without making proper and necessary enquiries which amounted to an error prejudicial to the interest of the revenue was also upheld.

The J.M., however, took the view that the decision of a Special Bench of the Tribunal cannot be looked upon as a decision of the authority superior to that of a Division Bench. He further held that the decision of a Special Bench was neither binding on the Division Benches nor enjoyed any precedence over the decision of a Division Bench. Accordingly, he opined that since order of the Income Tax Officer was based on the decision of a Division Bench, the same could not be termed as erroneous by the Commissioner merely because a different view was taken by a larger Special Bench. Thus, according to him, the conditions for exercise of power u/s 263 of the Act were not fulfilled and, therefore, the Commissioner's order was liable to be vacated. The J.M. also disagreed with the view of the A.M. that weighted deduction on various items listed at serial Nos. 4 to 11 of its claim had been allowed by the Income Tax Officer without proper inquiry. According to him, the Income Tax Officer had not accepted the claim in a huff without proper appraisal of the facts of the case or without appreciating the detailed reply filed by the assessee.

In view of the difference of opinion, the matter was placed before a Third Member. The Senior Vice President acting as Third Member, concurred with the Judicial Member. According to him, it was not correct to say that a Special Bench decision must be held to have overruled the Division Bench decision and, therefore, the Division Bench view was not entitled to be followed. He further opined that when the Special Bench view is adopted only by way of convention amongst the Members of the Tribunal in the country as of persuasive value entitled to greater respect and not as binding precedent, it could not be conceived that it could have the same effect on the Income Tax Officer. He further observed that if both a Division Bench view and a Special Bench decision, were available to the Income Tax Officer, he should normally follow the view expressed by the Special Bench unless he was able to point out some glaring omissions or was able to show that it was *per incuriam*. He referred to the common practice prevalent in the department about the Income Tax Officers not following the orders of the Tribunals on the ground that a reference application has been filed and that sometimes the Income Tax Officers even do not follow a judgment of the High Court by observing that appeal has been filed in the

Supreme Court. Without commenting on how far the approach of the Income Tax Officer was justified, his conclusion was that when the Income Tax Officer feels free not to follow an order of the Tribunal, he cannot be expected to follow the order passed by a Special Bench of the Tribunal, more so, when it has not been brought to his notice. Accordingly, he held that the Income Tax Officer had committed no error in following the order of the Division Bench of the Tribunal. The Senior Vice President also dealt with the meaning of word "record" used in section 263 and held that it referred to the record as it stood before the Income Tax Officer and not any subsequent material that came on surface. Thus, when the order of the Special Bench of the Tribunal was not on the record of the Income Tax Officer, the same did not form part of "record" and, therefore, could not be a basis for exercise of jurisdiction by the Commissioner u/s 263. Dealing with the controversy about items at serial Nos. 4 to 11 as to whether the Income Tax Officer had made proper inquiry or not, he concluded that the Commissioner was not correct in saying that the assessee had not produced enough evidence to justify its claim and that the Income Tax Officer was in error when he accepted its claims. It was, therefore, held that the Commissioner could not assume jurisdiction to unsettle the finality of that view of the Income Tax Officer in the hope that something would come out if a further inquiry was ordered.

6. From the above noted factual position, it is apparent that the Tribunal has proceeded on the assumption that the Income Tax Officer while allowing the deduction u/s 35B, had followed some decision of a Division Bench of the Tribunal. This appears to be factually incorrect. The relevant, extract from the assessment order, wherein the assessee's claim for deduction u/s 35B has been dealt with has already been reproduced earlier. The Income Tax Officer has not referred to any decision of the Tribunal and had allowed the claim on the basis of his own understanding of the relevant provision. In fact, he has not even mentioned the specific activities in respect of which the expenditure had been incurred so as to show how the same fell specifically under any of the sub-clauses of clause (b) of sub-section (1) of section 35B of the Act.

7. At this juncture, it would be useful to refer to section 35B as it existed at the relevant time. It was as under :

"35B. (1)(a) Where an assessee, being a domestic company or a person (other than a company) who is resident in India, has incurred after the 29-2-1968, whether directly or in association with any other person, any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) referred to in clause (b), he shall, subject to the provisions of this section, be allowed a deduction of a sum equal to one and one-third times the amount of such expenditure incurred during the previous year:

Provided that in respect of the expenditure incurred after the 28-2-1973, by a domestic company, being a company in which the public are substantially interested, the provisions of this clause shall have effect as if for the words "one and one-third times", the words "one and one-half times" had been substituted.

(b) The expenditure referred to in clause (a) is that incurred wholly and exclusively on :

(i) advertisement or publicity outside India in respect of the goods, services or facilities which the assessee deals in or provides in the course of his business;

(ii) obtaining information regarding markets outside India for such goods, services or facilities;

(iii) distribution supply or provision outside India of such goods, services or facilities, not being expenditure incurred in India in connection therewith or expenditure (wherever incurred) on the carriage of such goods to their destination outside India or on the insurance of such goods while in transit;

(iv) maintenance outside India of a branch, office or agency for the promotion of the sale outside India of such goods, services or facilities;

(v) preparation and submission of tenders for the supply or provision outside India of such goods, services or facilities, and activities incidental thereto;

(vi) furnishing to a person outside India samples or technical information for the promotion of the sale of such goods, services or facilities;

(vii) travelling outside India for the promotion of the sale outside India of such goods, services or facilities, as may be prescribed;

(viii) performance of services outside India in connection with, or incidental to, the execution of any contract for the supply outside India of such goods, services or facilities; and

(ix) such other activities for the promotion of the sale outside India of such goods, services or facilities; as may be prescribed.

Explanation : In this section, "domestic company" shall have the meaning assigned to it in clause (2) of section 80B.

(2) Where a deduction under this section is claimed and allowed for any assessment year in respect of any expenditure referred to in sub-section (1), deduction shall not be allowed in respect of such expenditure under any other provision of this Act for the same or any other assessment year."

8. A perusal of the chart filed by the assessee in respect of the claim of deduction u/s 35B shows that it had referred to the specific sub-clauses of the relevant provision only in respect of some of the items. The deduction against freight charges, clearing charges and inspection charges had been claimed under sub-clause (iii) of section 35B(1)(b). The Commissioner has recorded a categorical finding that deduction on these expenses was not permissible. According to him, the language of this clause clearly shows that expenditure incurred in India has been specifically excluded from its purview. In support of his finding, the Commissioner, relied on the decision by a Special Bench of the Tribunal in the case of J. Hemchand & Co. decided by the Bombay Bench on

17-6-1978 (supra). He was of the considered view that contrary view expressed by certain other Division Benches of the Tribunal were not based on a correct interpretation of the aforesaid clause. Regarding salaries, bonus, rent and stationery, the claim was made under "sub-clauses (i) to (iv)" Without specifying the nature of activity to justify how it was covered in any of the aforesaid clauses. The claim in respect of commission to SAIL, postage and telegrams and commission to Promotion Council had not been related to any of the clauses at all. The deduction on advertisement had been claimed under sub-clause (i) of sub-section (b) of section 35B(1). In respect of these items, the Commissioner while ordering a fresh assessment, has directed that in the interest of justice the assessee be given opportunity to furnish the details and lead evidence to show that the expenditure incurred fell specifically within the ambit of any of the sub-clauses of section 35B(1)(b).

9. A further perusal of the grounds on which the Commissioner had sought to assume jurisdiction u/s 263, which have already been reproduced in the earlier part of this judgment, shows that in para (i) it has been observed that having regard to the details furnished by the assessee in respect of expenses on which deduction u/s 35B had been claimed, it could not be said that the same had been incurred wholly and exclusively on the activities specified in clause (b) of section 35B. It is also observed that the mere fact that an expenditure had been incurred in connection with and in the course of a business for the export of goods outside India, does not by itself mean that the expenditure had been incurred on the activities specified in the aforesaid provision. In the other grounds contained in paras (ii) to (v), the Commissioner had gone into the merits of the admissibility of deduction u/s 35B under various heads of expenditure. If the objection of the Commissioner raised in para (i) is sustainable, the exercise of jurisdiction u/s 263 has to be upheld on that ground alone and it is unnecessary to go into the other issues raised in the present case.

10. A plain reading of section 35B shows that the weighted deduction on expenses under this provision can be allowed only if they are wholly and exclusively incurred for any of the purposes mentioned in the sub-clauses of section 35B(1)(b). The provision is quite clear and categorical. Since it is the assessee who claims the benefit of weighted deduction, it is for him to prove the facts which will bring the case within any of these sub-clauses. Unless that is done, the assessee will not be entitled to get this deduction. This position in law stands settled by the Supreme Court in *Commissioner of Income Tax, Delhi Vs. Stepwell Industries Ltd. and etc. etc.*, and *Commissioner of Income Tax (CNTL), Ludhiana Vs. Hero Cycles Pvt. Ltd., Ludhiana*, .

11. In the case of *Stepwell Industries Ltd. (supra)*, the controversy was whether the Tribunal was justified in allowing weighted deduction in respect of various items of expenditure, The Supreme Court interpreted section 35B of the Act and held (at p. 175) :

"In order to get this deduction, the assessee will have to prove that the

expenditure was incurred during the previous year wholly and exclusively for the purposes set out in clause (b) of section 35B. There can be any blanket allowance of the expenditure nor can there be any blanket disallowance. Every case has to be discussed specifically and the expenditure must be found to be of the nature mentioned in any one of the sub-clauses. If the expenditure does not fall in any of these categories, it cannot be allowed as a deduction. Some of the sub-clauses provide that if the expenditure is incurred in India, it cannot be allowed but in some of the sub-clauses this requirement is not there. In such cases, the expenditure may or may not be incurred in India. Every case will have to be examined in the light of the provisions of the sub-clauses and the facts proved by the assessee."

The Supreme Court considered the facts of that case in the light of the legal position set out above and observed (at p. 177) :

"It appears that the Tribunal did not examine the claim of the assessee by reference to any of the sub-clauses of section 35B(1)(b). No expenditure can be allowed u/s 35B generally. The assessee must be able to establish the facts to prove that the expenditure falls within the ambit of sub-clauses (i) to (ix) of clause (b) of section 35B(1). This has not been done....."

In view of the above finding, the Supreme Court set aside the order of the High Court as also the Tribunal and remanded the case back to the Tribunal with the following direction (at p. 177) :

"We are of the view that the appellate order of the Tribunal has to be set aside. We set aside the order of the High Court as also the appellate order of the Tribunal and remand the case back to the Tribunal. The assessee will have an opportunity of proving the nature of the expenditure and establishing that the expenditure falls within any one of the sub-clauses of section 35B(1)(b). It has to be remembered that the onus is on the assessee to establish the facts to obtain the deduction claimed. The appeal is allowed with the above observations. There will be no order as to costs."

12. The legal position in regard to the allowability of weighted deduction u/s 35B of the Act has been reiterated by the Supreme Court in the case of Hero Cycles (P) Ltd. (supra) in the following words (at p. 468) :

"The deduction is permissible if the expenditure is laid out wholly and exclusively for the purposes mentioned in clause (b) of section 35B(1). It is for the assessee to prove that the entire expenditure involved was exclusively for the purposes mentioned in clause (b) of section 35B(1). The Tribunal has also to give a finding as to the entitlement of the assessee with reference to the particulars of clause (b) of section 35B(1). The facts have to be found out and the law has to be applied to those facts."

On a perusal of the facts of the case before it, the Supreme Court observed that the Tribunal was unmindful of the various sub-clauses of section 35B(1) and had

allowed the deduction without verifying or examining the sub-clauses under which the deduction claimed by the assessee could be allowed. The Supreme Court, therefore, set aside the order of the Tribunal and sent the matter back to the Tribunal to dispose of the same after examining the facts afresh.

13. In the present case also, the order of the Income Tax Officer shows that he has allowed the claim for deduction u/s 35B(1) by observing that "these have been incurred in connection with the export business which comprises of entire sales to Pakistan of the various items mentioned above". There is no finding that the expenditure related to any of the activities mentioned in various sub-clauses of section 35B(1). The Commissioner had examined the record and has noticed that the details of various expenses which were furnished by the assessee only showed the dates on which the expenses were incurred and/or the persons to whom the payment for these expenses was made. No material or evidence was furnished to show that these expenses had been incurred on any of the activities mentioned in the various sub-clauses of section 35B(1)(b). In fact, during the course of proceedings u/s 263 before the Commissioner, the assessee's representatives themselves agreed to this aspect and prayed for more time to furnish the necessary evidence in the matter. Thus, it is evident that the claim of the assessee u/s 35B had been allowed by the Income Tax Officer without the assessee placing any material on record to show that the expenditure related to the activities mentioned in various sub-clauses of section 35B(1)(b). The question of applicability of any decision of a Bench of the Tribunal could have arisen only after the factual position had been ascertained by the assessing officer. This had not been done. Mere filing of details of expenditure running into 40 pages along with copies of the orders of some Benches of the Tribunal was of no consequence without placing evidence to show that the said expenditure had been incurred on the activities specified in various sub-clauses of section 35B(1)(b). This being the position there can be no doubt that the order of assessment was erroneous to that extent causing prejudice to the interest of revenue. The learned A.M. had correctly appreciated this position in paras 12 and 12.1 of his order. The Madras High Court in *Indian Textiles Vs. Commissioner of Income Tax*, upheld the action of the Commissioner u/s 263 under exactly similar circumstances. In that case also, the Income Tax Officer had given relief u/s 35B without any proper verification. The Commissioner exercising jurisdiction u/s 263, held that the assessee was not entitled to deduction u/s 35B and, accordingly, directed the Income Tax Officer to amend the original order withdrawing the said deduction. On appeal, the Tribunal upheld the invocation of jurisdiction by the Commissioner u/s 263 but did not agree with the Commissioner that the assessee can be denied relief u/s 35B straightaway without further inquiry in the matter. The order of the Commissioner was, accordingly, modified to that extent and the matter regarding admissibility of deduction u/s 35B was remanded to the Income Tax Officer. On reference the order of the Tribunal was sustained by the High Court. The facts of the present case are on all fours with the case of *Indian Textiles* (supra).

14. Viewed from this angle, we find that the questions referred to us by the Tribunal for our opinion do not project the controversy in the right perspective. Accordingly, we reframe question No. 1 as under :

"Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that the Income Tax Officer did not commit an error prejudicial to the interest of the revenue in allowing the assessee's claim for deduction u/s 35B of the Income Tax Act, 1961, to the tune of Rs. 11,39,117 ?"

In the light of the legal and factual position as discussed above and respectfully following the view taken by the Madras High Court in the case of *Indian Textiles (supra)*, we answer this question in the negative, i.e., against the assessee and in favour of the revenue. There was no material on record to show that the expenditure incurred by the assessee under each head related to the activities specified in various sub-clauses of section 35B(1)(b). In fact, the Income Tax Officer had not examined this aspect at all and, therefore, the order of assessment was erroneous and prejudicial to the interest of revenue. Exercise of jurisdiction u/s 263 was, therefore, justified. Normally, as a consequence of this finding the entire matter about the admissibility of deduction u/s 35B on the various items of expenditure should have been remanded back for fresh determination by the Income Tax Officer and the Commissioner should not have straightaway disallowed the claim for deduction of freight, clearing charges and inspection charges. We were inclined to issue such a direction and modify the order of the Commissioner accordingly. We, however, find that such a direction will not serve any useful purpose as the assessee is not entitled to this deduction in view of the clear provisions of law as also the law laid down by their Lordships of the Supreme Court in the case of *Stepwell Industries Ltd. (supra)*. The assessee is claiming deduction on the three aforesaid items of expenditure under sub-clause (iii) of section 35B(1)(b). The expenditure has, admittedly, been incurred in India and, therefore, does not qualify for deduction. This position stands settled by the Supreme Court in the case of *Stepwell Industries Ltd. (supra)*. At page 176 of the report, their Lordships has observed as under :

"The expenditure which qualifies for deduction u/s 35B(1)(b)(iii) will have to be expenditure incurred outside India in connection with distribution, supply or provision outside India of such goods, services or facilities. No deduction u/s 35B can be allowed to the assessee for expenditure incurred in India in connection with sale of goods. There is no dispute that the expenditure was wholly incurred in India."

Even otherwise, the provisions of sub-clause (iii) of section 35B(1)(b) are totally unambiguous and have no scope for more than one interpretation. This aspect of the matter has totally been lost sight of by the Tribunal. Even if the view that the decision of a larger Bench does not take precedence over the judgment of a Division Bench, were to be upheld the Tribunal ought to have examined whether the provisions of clause (iii) of section 35B(1)(b) were capable of two interpretations or not. This has not been done. Sub-clause (iii) of section 35B(1)

(b) as originally enacted by the Finance Act, 1968, was as under :

"(iii) Distribution, supply or provision outside India of such goods, services or facilities."

However, vide section 8 of the Finance Act, 1970, the following words and brackets were added at the end of this clause with retrospective effect from 1-4-1968 :

"not being expenditure incurred in India in connection therewith or expenditure (wherever incurred) on the carriage of such goods to their destination outside India or on the insurance of such goods while in transit."

A plain reading of clause (iii) after its amendment makes it absolutely clear that expenditure incurred in India does not fall within its purview. How any Bench of the Tribunal could take a contrary view is beyond our comprehension unless it was considering the unamended clause (iii). We are satisfied that such a contrary view is not even a possible view. That being so, the order of the Income Tax Officer allowing deduction under this provision on expenditure incurred in India on freight charges, clearing charges and inspection charges was indeed erroneous and prejudicial to the interest of the revenue. We also draw support from the decision of the Gujarat High Court in CIT v. M.M. Khambhatwala (1992) 198 ITR 144 where the action of the Commissioner u/s 263 under identical circumstances was upheld. In that case also, the Commissioner was of the view that the Income Tax Officer had wrongly allowed deduction u/s 35B on expenditure of port fees, freight charges, etc. The High Court rejected the contention raised on behalf of the assessee that since the matter was debatable, the exercise of jurisdiction u/s 263 was barred.

15. Before concluding, we may refer to the judgment of the Calcutta High Court in Russell Properties Pvt. Ltd. Vs. A. Chowdhury, Addl. Commissioner of Income Tax and Others, , on which the learned J. M. as well as the Senior Vice President have placed heavy reliance. In that case, the Income Tax Officer while framing the assessment for assessment years 1967-68 to 1969-70 had followed the decision of the Tribunal in assessee's own case on the same issue for the assessment year 1966-67. Such is not the position in the case in hand. There is no earlier appellate decision in assessee's own cause regarding deduction u/s 35B.

The view of our answer to question No. 1 as above, question No. 2 is only of academic interest and is returned unanswered.

16. Even question No. 3 is also of academic interest only. However, the matter now stands concluded by the judgment of the Apex Court in CIT v. Shree Manjunathesware Packing Products & Camphor Works (1998) 231 ITR 53 in which it has been held that the expression "record" in section 263 means the record available at the time of examination by the Commissioner and is not confined merely to the material available to the Income Tax Officer. In the light of

this judgment the question No. 3 is answered in the negative, i.e., against the assessee and a in favour of the revenue.

The reference is, accordingly, disposed of in the above terms. There shall be no order as to costs.

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